

Welsh Devolution and the Protection of the Environment: The Story so Far and the Future Challenges

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The Welsh environment has strong ties with its social, political and cultural history. Historically, economic development in Wales was once rooted in mining natural resources, but promoting Welsh landscapes in the tourism industry continues to bring significant economic benefits which are vital in a country that suffers from high levels of poverty.¹ Environmental protection has been a devolved matter in Wales since the inception of the Welsh Assembly, but it is only since 2011 that this Government has enjoyed primary legislative powers; and then only under a conferred powers model.¹ Nevertheless, the inclusion of a constitutional duty to create a sustainable development scheme in the original Government of Wales Act 1998 was enthusiastically supported by the Assembly. Aside from the Assembly's focus on sustainable development, its specific environmental priorities have been woodland development and waste; policy areas in which Wales had been identified as lagging behind other European countries.¹ However, it was not until its second term that the Assembly introduced a comprehensive environmental strategy setting out its strategic direction for the next 20 years.¹

Significant strides in developing environmental policy in Wales were made during the third term of the Assembly. It produced new strategies in key sectoral areas i.e., woodlands, waste and climate change;¹ and published what proved to be its last sustainable development scheme – One Wales, One Planet.¹ This focused on the achievement of five headline indicators that included reducing its ecological footprint to the global average within a generation and increasing the percentage of Biodiversity Action Plan habitats and species recorded as stable or increasing.¹ These headline indicators were supplemented by a much longer list of outcomes subject to an annual system of reporting under the Environmental Strategy.¹

In 2011, the annual report on the Environmental Strategy welcomed improvement on several aspects of pollution and progress on recycling, fly-tipping, sustainable use of water resources and flood risk measures.¹ However, key indicators in decline included access to green and open spaces; the percentage of the population living in air quality management areas and the number of tranquil areas.¹ Perhaps most importantly, it also recorded a declining long term trend in Wales's ecological footprint.¹ At the same time, the Assembly's Sustainability Committee reported on the problems in meeting international targets for biodiversity.¹ Thus, evidently there was more progress to be made in protecting Wales's environment.

Following the landmark referendum providing primary law making powers for the Assembly, its first legislative programme included an ambitious agenda for the

development of planning and environmental legislation for Wales. In light of the work of the Assembly with respect to sustainable development the centre piece became the Well-being of Future Generations (Wales) Act 2015 (The Future Generations Act). This was followed by the Planning (Wales) Act 2015, Environment (Wales) Act 2016 and Heritage (Wales) act 2016.

There is insufficient room in this article to discuss this legislation in-depth and there is already some detailed discussion in the legal literature.¹ However, there are a number of general observations that can be made about the legislative process. First, a great deal of research and evidence was provided by the Welsh Government in preparing this legislation which was helpful in understanding the thought processes that went into its creation. Secondly, given that the Assembly is a unicameral chamber of only 60 members the scrutiny provided by the Environment and Sustainability Committee also proved significant and a large number of stakeholders, including UKELA, contributed to this.¹ This task was not however, made easy by the extent of the legislation and the speed with which it was passed. Another important issue is the framework nature of much of this legislation which leaves significant detail to be provided by secondary legislation;¹ and most stakeholders agreed that the Environment and Sustainability Committee should play a central part in scrutinising the implementation of the new legislation.¹

The National Assembly for Wales held elections for its Fifth Term on the 1st March 2016 which failed to return a Labour majority. Leading a minority government, and with only one Liberal Democrat AM to work with, the Labour Administration has been forced to consider the demands of Plaid Cymru, its only other possible ally, more seriously. The make-up of the newly entitled Climate Change, Environment and Rural Affairs Committee of the Assembly has changed considerably and is now chaired by Mark Reckless, UKIP AM.¹ One of the first tests for this new government and the new legislative framework for environmental protection and planning will be the way in which it addresses the decision M4 relief road.¹ The Government remains committed to their preferred route despite criticism from the Future Generations Commissioner of the sustainable development report that accompanied the application.¹ There will therefore, be much to discuss at the planning inquiry which opens on 1st November 2016.

Another important challenge facing the Assembly is in shaping and responding to the Wales Bill currently before Parliament. This will provide a 'reserved powers' model for the Assembly and includes reservations and specific conferrals of power that will affect planning and environmental protection in Wales. The Bill makes changes to the nature of 'nationally significant infrastructure' projects covered by the Planning Act 2008 and therefore subject to decision making by the UK Government. This includes ports and raising the threshold for electricity generation project in Wales (or offshore) to 350 MW.¹ The latter addresses the long running battle between the UK and Welsh Government on who should have power over energy projects, particularly wind farm projects, in Wales. Another point of contention has been fracking and the Bill will provide the Welsh Government with the relevant powers over onshore petroleum licencing in this respect.¹ However, the Bill controversially includes the Community Infrastructure Levy as a reservation.¹

Brexit is also, of course, high on the political agenda for the Assembly which has set up a new Committee on External Affairs and Additional Legislation to consider the implications for Wales.¹ This will begin taking evidence from stakeholders in Wales in the autumn of 2016. The Welsh Government is obviously keen to have a voice in the negotiations on Brexit and understanding the specific consequences for this devolved state of the repatriation of powers to the UK presents a major challenge.

UKELA's Wales Working Party (WWP) will continue to respond to the developing agenda for environmental protection in Wales and the challenges presented by further devolution and Brexit. Our recent event on Planning in Wales heard from Huw Williams (Geldards) on the implementation of the Planning (Wales) Act 2015 and Charles Mynor on the Law Commission's Scoping Paper on this issue. On the 10th November 2016 we will welcome the Future Generations Commissioner who will be providing her account of her role in National Infrastructure Planning; and Victoria Jenkins, co-convenor of the WWP will also be taking part in a break out session at the Legal Wales Conference on 7th October 2016 on the implementation of the Well-Being of Future Generations (Wales) Act 2015. We also continue to engage with Welsh Government on these issues and Victoria will be providing evidence on Brexit and issues for environmental law and policy to the Assembly's Committee on External Affairs and Additional Legislation on 31st October 2016. If anyone is interested in getting involved in the work of the UKELA WWP please contact Victoria.

¹ Overall the environment is relatively more important to the Welsh economy than it is to the other UK nations. UK National Ecosystem Assessment Technical Report (Status and Changes in Ecosystems and their Services to Society - Wales) (2011). The designated landscapes of Wales are particularly important in these respect. Wales has three National Parks and five Areas of Outstanding Natural Beauty which together cover 24% of the land in Wales.

¹ On environmental protection in the early days of the Assembly see V Jenkins, 'Environmental Law in Wales' (2005) *Journal of Environmental Law* 17(2) 207-227.

¹ See further Woodlands for Wales: The Welsh Assembly Government's Strategy for Woodlands and Trees (Forestry Commission Wales, 2001) and Wise About Waste (Welsh Government, 2003).

¹ Environment Strategy for Wales (Welsh Assembly Government, 2006). The strategy was also accompanied by a system of action planning to ensure its success. Environment Strategy Action Plan 2008-2011 (Welsh Assembly Government, 2008). A system of reporting on the outcomes of this strategy was introduced in 2009.

¹ Woodlands for Wales: The Welsh Assembly Government's Strategy for Woodlands and Trees (Forestry Commission Wales, 2009), Towards Zero Waste (Welsh Government, 2010) and Climate Change Strategy for Wales (Welsh Government, 2010).

¹ One Wales, One Planet (Welsh Government, 2009).

¹ Ibid.

¹ This provided an update on progress in achieving the 39 outcomes and 101 indicators identified in the strategy.

¹ Environment Strategy Annual Report 2010-2011 (Welsh Assembly Government, 2011) p.11.

¹ Ibid, p.12.

¹ Ibid. This was included as a matter of clear improvement in the SD indicators which reviewed progress over a shorter time period.

¹ National Assembly for Wales Sustainability Committee Inquiry into Biodiversity (NAW, 2011).

¹ E.g. V Jenkins, 'The Environment (Wales) Bill: Adopting an Ecosystems Approach in the Protection of the Welsh Environment' E-law (Issue 90, October 2015) p. 41; H. Williams & V. Jenkins, 'The Planning (Wales) Act 2015: a Case Study in Evidence-Based Planning Reform under Devolution', *Journal of Planning and Environmental Law*, 2016, p. 637; H Williams and V Jenkins, 'The Planning (Wales) Act 2015: Part 2 Lessons in Law Making under Devolution *Journal of Planning Law* 2016',

p.860; H. Davies, 'The Well-being of Future Generations (Wales) Act 2015: duties or aspirations?' (2016) Environmental Law Review, p. 41 and N. Barry, 'The Wales Working Party and the Well-being of Future Generations Bill' E-law (Issue 86, February 2015) p. 31.

¹ See discussion on the Planning (Wales) Act 2015 in H. Williams & V. Jenkins, *ibid*.

¹ See [comments of the Constitutional and Legislative Affairs Committee](#).

¹ Fourth Assembly Legacy Report (National Assembly for Wales, Environment and Sustainability Committee, 2016)

¹ See [Climate Change, Environment and Rural Affairs Committee details here](#).

¹ See [details on the M4 relief road here](#).

¹ 'Welsh government told that M4 Relief Road falls short of vital mark', Wales Online, 19th July 2016.

¹ Wales Bill 2016, clause 36. It also removes 132kV electric lines out of the Planning Act 2008 regime in Wales if they are associated with a sub-350MW electricity generation project (Clause 38) and harbour projects (clause 32). However, any associated development for these electricity generation projects and electric lines will also now be included (clause 39).

¹ *Ibid*. Clauses 22-24.

¹ *Ibid*. Section M4.

¹ See [Committee on External Affairs and Additional Legislation details here](#).